ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	

COMMENTS OF INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

Given that ICTA members focus their competitive efforts on the MDU market, ICTA believes that the uniform rate structure requirement is of critical importance. Accordingly, ICTA urges the Commission to define the parameters of "effective competition" such that there actually is a restraining effect on cable rates, especially since it is the absence of effective competition which initially triggers the uniform rate structure requirement. ICTA agrees with the Commission's conclusions that it must follow Congress's direction as to the definitions of "offer" and "comparable programming." In addition, ICTA agrees with the tentative conclusion that superstations not be deemed broadcast stations for purposes of ascertaining "comparable programming." However, ICTA seriously disputes the validity of the Commission's tentative rules as to when an MMDS operator offers local broadcast channels. ICTA recommends that the Commission adopt regulations consistent with the Commission's retransmission consent rules. That is, an MMDS operator should not be considered to "offer" "comparable programming" unless local broadcast programming is physically retransmitted from the MMDS operator's central transmission facility with the consent of the broadcaster along with its other microwave delivered signals or the operator fails to abide by the retransmission consent restrictions set forth in 47 CFR 76.64(e). ICTA further submits that the Commission should exempt, as direct-to-home satellite service, SMATV MDU service as a source of effective competition under the LEC test.

Notwithstanding that Section 301(b)(2) of the Telecommunications Act of 1996 ("the 1996 Act") carves out an exception to the uniform rate structure requirement for bulk discounts to MDUs, this exception -- if interpreted too broadly -- will swallow the rule. The purpose underlying the uniform rate structure requirement must still be served preventing the barriers to competitive entry

posed by de facto monopoly-based predatory pricing sustained by the ability to cross-subsidize. The Commission should therefore respect the definite industry usage of the term "bulk discount" -- meaning a discounted price negotiated and paid for by the property ownership or management on behalf of all the tenants pursuant to a single agreement executed between the property owner or manager and the cable operator or other MVPD. Moreover, the Commission should recognize that Congress adopted the Commission's own definition of "multiple dwelling unit" -- as excluding developments consisting of detached single family residences, and not tamper with the term for purposes of this exception. Finally, Congress's prohibition on predatory pricing should be governed by a bright-line standard, focusing on a price percentage differential of ten percent or greater as between "like MDUs," rather than federal antitrust law. The cable operator would then have the burden of proving an economic justification for the price differential. Such a standard and procedure will realistically permit competitors and the Commission to implement congressional intent in a timely and cost-effective manner while allowing cable operators sufficient flexibility to compete.

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INTRODUCTION

The Independent Cable & Telecommunications Association ("ICTA"), by its attorneys, hereby submits the following comments in the above-referenced proceeding.[1/] ICTA is a national trade association formed to represent and advance the interests of a cross-section of companies on the cutting-edge of the telecommunications revolution leading the U.S. into the twenty-first century. Its members include private cable operators (also known as satellite master antenna television), shared tenant services providers, equipment manufacturers, program distributors, and property management and development companies. While ICTA operator members originally focused on the video services marketplace, the last five years in particular have marked a shift in their competitive entry efforts into the provision of voice and data communications services to consumers throughout the country. ICTA operator members employ a variety of telecommunications technologies, both

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1/ ICTA is the successor organization to the National Private Cable Association.

wired and wireless, to serve primarily the residential multiple dwelling unit ("MDU") market. Thus, ICTA members primarily compete with both franchised cable operators, the dominant force in the local multichannel video programming distribution market, and incumbent local exchange carriers, the dominant force in the local telephone market.

DISCUSSION

I. IN CONSTRUING THE ELEMENTS OF THE LEC EFFECTIVE COMPETITION TEST, THE COMMISSION SHOULD BE GUIDED BY CONGRESS'S INTENT THAT SUCH COMPETITION SHOULD ACTUALLY HAVE A RESTRAINING EFFECT ON CABLE RATES

A. The Commission Is Bound By The Definition Of "Comparable Programming" Set Forth By Congress In The Conference Report To The 1996 Act, *i.e.*, A Minimum Of Twelve Channels, At Least Some Of Which Are Television Broadcasting Signals

The legislative history clearly reflects Congress's intent with respect to the definition of comparable programming for the purpose of determining whether a LEC presents effective competition. The Conference Report states that "the conferees intend that 'comparable' requires that the video programming services should include access to at least 12 channels of programming, at least some of which are television broadcasting signals." Telecommunications Act of 1996 Conference Report, S.Rep. 104-230 at 170 (Feb. 1, 1996) ("Conference Report"). Faced with such explicit congressional direction, the Commission does not have the discretion to vary this standard. Therefore, ICTA supports the Commission's tentative conclusion that "comparable programming" consist of a minimum of twelve channels of programming, at least some of which are television broadcasting signals.

The Conference Report citation to the Commission's preexisting definition of comparable programming which requires that at least one of the twelve channels be nonbroadcast does not create a true ambiguity with respect to congressional intent. Order and Notice of Proposed Rulemaking

("NPRM") ¶ 69. First, the precise definitional language would control over a citation in any event. Second, this is a distinction without a difference. Given the context in which the Commission's preexisting definition was promulgated, that definition, while couched in terms of nonbroadcast channel inclusion, implicitly contemplated a programming package consisting of a combination of broadcast and nonbroadcast channels. That Congress cited to this definition merely indicates that Congress similarly believed that the Commission's definition implicitly required that some channels be broadcast as well as nonbroadcast. However, to the extent that the Commission intended its preexisting definition to be interpreted literally so as to totally exclude a broadcast signal component from the comparable programming element, that definition is no longer valid in the face of Congress's clearly expressed mandate. The standard established by Congress unquestionably requires that local broadcast channels be a part of a "comparable programming" package.

Regardless of which definition of comparable programming is ultimately adopted, ICTA agrees with the Commission that this definition should govern all prongs of the effective competition test. NPRM ¶ 70. Such consistency is critical to achieving the purpose underlying effective competition -- setting a standard of competition sufficient to have a restraining effect on cable rates.

Finally, ICTA strongly agrees with the Commission's interim decision --which should be made permanent-- that superstations[2/] should not be considered broadcast stations for purposes of the comparable programming definition. Congress clearly directed that consumers have traditional local programming available from another source before being subjected to marketplace-based rate decisions. By virtue of its plain language, Congress obviously believed that a competitor's service

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[2/] According to 17 U.S.C. § 119(d), a superstation is defined as "a television broadcast station other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier."

offering could not be truly comparable to the basic service offering of franchised cable operators without a local broadcast component. Being delivered by satellite to a national audience, superstations serve a different function than local broadcasting stations and to most subscribers appear indistinguishable from other satellite-delivered nonbroadcast programming. The Commission itself has repeatedly distinguished between superstations and local broadcasting stations. For example, the Commission's cable rate regulation rules do not require that the basic service tier include superstations, although it must include all of the other broadcast signals that the cable system distributes. 47 CFR § 76.901(a). Therefore, superstations should not be considered broadcast channels for purposes of satisfying the comparable programming element of any of the prongs of the effective competition test.

B. The Commission Is Bound To Retain Its Preexisting Definition Of "Offer" As Embraced By Congress In The Conference Report To The 1996 Act

The Commission's current definition of "offer" for purposes of determining the presence of effective competition is as follows:

> Service of a multichannel video programming distributor will be deemed offered: (1) When the multichannel video programming distributor is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and (2) When no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor. (47 CFR 76.905(e).)

ICTA supports the Commission's tentative conclusion to retain this definition for all prongs of the effective competition test, including the LEC prong.

The retention of this definition is plainly dictated by the Conference Report. The Conference Report states that "[f]or purposes of section 623(1)(D) of the Communications Act, 'offer' has the

same meaning given that term in the Commission's rules as in effect on the date of enactment of the bill. *See* 47 CFR 76.905(e)." Conference Report at 170. As with the definition of "comparable programming," the Commission lacks authority to depart from such an explicit congressional directive.

In any event, this definition represents a legitimate standard for ascertaining when video services are "offered" in fact, thereby maintaining a threshold of effective competition which will genuinely serve to restrain cable rates. Therefore, the Commission should effectuate congressional intent and retain its preexisting definition of offer for all prongs of the effective competition test.

C. An MMDS Operator Should Not Be Deemed To Offer Comparable Programming Unless It Retransmits Local Broadcast Signals From Its Central Transmission Facility Along With Its Other Microwave Delivered Signals

ICTA does not support permanent adoption of the Commission's interim decision that an MMDS operator will be deemed to be offering comparable programming even if the local broadcast stations are received by means of an over-the-air antenna located at the subscriber's residence, rather than integrated with the MMDS operator's microwave package, as long as no A/B switch is employed or if such switch if employed is physically installed by the MMDS operator. The interim rule is flatly contrary to the Commission's retransmission consent rules wherein "offer" is equated with an actual "retransmission" by the MMDS operator.[3/]

3/ Much as it may wish to, the Commission cannot simply gloss over this inconsistency by stating that the rule for effective competition would have no effect on the retransmission consent rules. See NPRM ¶ 24, n. 24. If it permanently adopts such contradictory policies, the Commission must address the inconsistency and provide a rational explanation for it. ICTA submits that the interim rule is arbitrary and capricious, especially since Congress is deemed knowledgeable of the Commission's retransmission consent rules and left them intact in the 1996 Act.

The retransmission consent rules clearly provide that an MMDS operator is not required to obtain retransmission consent where the broadcast signals are received by master antenna television (MATV) facilities or by direct over-the-air reception in conjunction with service provided by the MMDS operator, provided that such signals are made available without charge and at the subscriber's option, and provided further that the antenna facility used for the reception of such signals is either owned by the subscriber or building owner, or under the control of the subscriber or the building owner and available for purchase upon termination of service. 47 CFR 76.64(e). It is wholly irrelevant whether an A/B switch is employed at all or if employed whether the operator provides and installs it just as it is irrelevant that an off-air antenna is employed and is provided and installed by the operator. The key components are obviously that the MMDS operator receives no remuneration for the subscriber's receipt of the local broadcast signals and that such receipt can be accepted or rejected by the subscriber since such programming is not integrated with the MMDS operator's microwave signal transmission.

To hold that an MMDS operator actually "offers" local broadcast channels as part of its overall programming package under the circumstances outlined by the Commission in its interim rule and yet simultaneously hold that MMDS operator need not obtain broadcaster consent for that "offering" since it is not actually an "offering" without an actual "retransmission" for a fee is illogical. Instead, the Commission should adopt a permanent regulation mirroring the distinctions drawn in the retransmission consent proceeding, which were the product of an extended rulemaking in which all elements of the industry participated.[4/]

4/ This should also be the case with respect to whether SMATV systems can be deemed to be offering comparable programming, for nonMDU type SMATV systems or for all SMATV systems should the Commission not find traditional SMATV MDU service to be equivalent to direct-to-home

For similar reasons, the Commission should not rely upon marketing materials used by an MMDS operator to determine that the local broadcast channels are offered by the operator, so long as these channels are provided free of charge pursuant to the retransmission consent rules. Such materials merely inform potential subscribers that they can choose to continue to receive such channels via an off-air antenna even though the MMDS operator does not supply such channels as part of its subscription package.

D. The Commission Should Exempt Satellite Master Antenna Television ("SMATV") MDU Service As A Source Of Effective Competition Under The LEC Test Since Such Service Constitutes Direct-To-Home Satellite Service

ICTA supports the Commission's classification of traditional SMATV MDU service[5/] as equivalent to direct-to-home satellite service thereby exempting such service as a source of effective competition under the LEC prong of the effective competition test. NPRM ¶71. While the term "direct-to-home satellite services" is not defined for purposes of Section 301, a literal reading of the term in the MDU context reflects the reality of a traditional private cable system by which satellite signals are distributed direct to a receive-only antenna used only to serve residents of that particular MDU. Although "direct-to-home satellite service" is defined twice in the 1996 Act, in both instances Congress specifically restricted use of such definition to that particular subsection. It is a long-standing rule of statutory construction that a definition contained in legislation extends only to as much of the legislation as the act itself designates 2A Norman J. Singer, Sutherland Statutory

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satellite service. See Section I.D., infra.

5/ By "MDU," ICTA refers to multiple dwelling unit(s) as that term is defined in Section II.B., infra.

Construction § 47.07 (1992). Thus, the definitions used in other parts of the 1996 Act do not control the meaning of the term for purposes of Section 301(b)(3)(C).

Nonetheless, even if the Commission opted to apply Congress's "direct-to-home satellite services" definition to Section 301(b)(3)(C), SMATV MDU service would still fall within the scope of that definition. For example, Congress defined the term in Section 205(b) as "the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite."[6/] A traditional private cable system does not require ground receiving or distribution equipment other than that used at the particular MDU being serviced, and therefore is sufficiently within the ambit of such definition.[7/] Indeed, if SMATV MDU systems are not deemed to be included in this exemption, neither should a single DBS reception facility as installed on the roof of an MDU for service to the entire building. The two are functionally indistinguishable. Yet Congress clearly meant to include DBS in its exemption for purposes of application of the LEC effective competition test. Accordingly, SMATV MDU service should not be deemed a source of effective competition under the LEC test.

[6/] In the other instance in which Congress defined the term in the 1996 Act, within the subsection dealing with exemption from local taxation, the term means "only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite." Section 602(b)(1).

[7/] It is apparent that, although clearly intended to be included within this definition, Congress did not mean to limit "direct-to-home satellite service" to direct broadcast satellite service ("DBS"), as some might argue. Where Congress intended to speak only to DBS, it utilized that term explicitly rather than direct-to-home satellite service. See, e.g., Section 207, Restrictions on Over-the-Air Reception Devices.

II. THE MDU BULK DISCOUNT EXEMPTION TO THE UNIFORM RATE STRUCTURE REQUIREMENT SHOULD BE NARROWLY CONSTRUED IN ORDER TO EFFECTUATE CONGRESSIONAL INTENT

A. The Term "Bulk Discount" Has A Definite Industry Usage Known To Congress And The Commission

ICTA strongly agrees with the Commission's tentative conclusion that the exception created by Section 301(b)(2) does not permit a cable operator to offer discounted rates on an individual basis directly to subscribers simply because they reside in an MDU. NPRM ¶98. ICTA also agrees that bulk discounts do not include discounts billed individually to and paid for by MDU residents. Id. To conclude otherwise would contradict the plain meaning of the word "bulk," i.e., to deal in mass or volume, as well as long-standing, uniform industry usage of the term in actual contracting practice.

The simple undisputed fact is that bulk discounts (usually limited to the provision of basic and/or expanded basic packages) are negotiated and paid for by the property ownership or management on behalf of all of the tenants pursuant to a single contract executed between the property owner or manager and the cable operator (or other MVPD). ICTA's members routinely follow this marketplace "rule" and are generally unaware of any bulk discount contracts entered into by their competitors which depart from this marketplace "rule." Given the absence of any contrary direction on the part of Congress, the Commission should not alter this widespread industry usage and understanding of the term "bulk discount."

The franchised cable industry itself has heretofore consistently put forth the same definition of the term "bulk discount" as that urged by ICTA here. Indeed, in comments submitted pursuant to the first uniform rate structure rulemaking implementing the 1992 Cable Act, Continental

Cablevision stated "Cable operators negotiate these [bulk] service contracts with commercial businesses, MDU management companies and developers. A typical bulk billing agreement will reduce the rate to reflect the efficiencies of rendering one invoice and achieving 100% penetration of the MDU . . . ." Comments of Continental Cablevision . MM Docket No. 92-266, at 64 (emphasis added). Tele-Communications, Inc. similarly stated that "existing bulk rate contracts . . . are the product of vigorous negotiation with the MDU owner or manager." Petition for Reconsideration of Tele-Communications, Inc., MM Docket No. 92-266. at 21. It can only be concluded that the Commission relied on industry statements such as these describing the nature of bulk discounts in fashioning its own bulk discount "exception" to the uniform rate structure requirement based on same size and contract duration principles. See 47 CFR 76.984(b).

If the Commission permits an individually-paid "bulk discount" (an oxymoron), it invites the bulk discount exception to swallow the uniform rate rule with respect to MDUs. In that event, discounts would be provided to otherwise ordinary subscribers simply because they live in an MDU. Congress clearly did not intend to exempt all service to MDUs from the uniform rate structure requirement. Rather, only when service was provided in bulk did Congress intend to allow cost savings to be offered in exchange for the 100 percent penetration delivered and paid for by the property owner or manager. Therefore, the Commission should define bulk discount so as to ensure that this exception is properly limited in scope to rates negotiated and paid for by property ownership or management on behalf of all residents of the MDU

B. The Term "Multiple Dwelling Unit(s)" Has Been Defined Consistently By The Commission For Over Twenty Years As Known And Adopted By Congress

It is truly ironic that the Commission seeks comment on the precise meaning of the term "multiple dwelling unit(s)," as used in Section 301(b)(2), after Congress purposefully amended the

cable system definition to delete that term precisely because of the Commission's own long-standing definition of the term, as adopted by Congress, which repeatedly caused SMATV operators serving manufactured housing parks and planned unit developments to be subjected to franchising requirements despite the absence of any use of the public rights-of-way. NPRM ¶ 99. Given the extensive regulatory history whereby the term "multiple dwelling unit(s)" has been consistently limited to encompass only a single building containing multiple residences (or a complex of same) -- usually at the behest of the franchised cable industry this Commission would surely add insult to injury to alter the term's understood meaning at this late date and under circumstances where Congress has afforded no indication whatsoever that its use of the term "multiple dwelling unit(s)" in Section 301(b)(2) differed in any way from Congress's past usage of the term.

Quite simply, the Commission has always excluded developments consisting of detached single family residences, such as mobile home parks, planned and resort communities, and military installations from the definition of "multiple dwelling unit(s)." See, e.g., Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems, 63 FCC 2d 956, 996-97 (1977); Bayhead Mobile Home Park, 47 FCC 2d 763 (1974); Pacific Western Mobile Estates, Inc., 49 FCC 2d 269 (1974). Clearly, the seminal Commission decision dispelling any doubt on the issue is Massachusetts Community Antenna Television Comm'n ("MCATC"), 2 FCC Rcd 7321 (1987).

Therein, MCATC obtained a declaratory ruling clarifying the cable system definition in the 1984 Cable Act, which essentially codified the preexisting definition promulgated by the Commission. Relying upon what was even then regarded as long-standing Commission precedent, MCATC requested that the Commission rule that a system serving a "planned community which

includes single family dwellings" is not a "multiple dwelling unit(s)," and accordingly does not fall within the private cable exemption -- even if located wholly on private property. 2 FCC Rcd at 7321. Having maintained a "multiple dwelling unit(s)" exception to the definition of a cable system since 1966,[8/] the Commission recognized that such systems were consistently excluded from the exception, notwithstanding that the facilities did not utilize any public rights-of-way. In granting MCATC's petition, the Commission cited "long-standing Commission precedent, legislative intent, and the clear language of the [1984] Cable Act" in holding that a planned community, consisting of some single family dwellings albeit located wholly on private property, did not constitute a "multiple dwelling unit(s)." (emphasis added). It is difficult to fathom how the Commission can even propose shifting to a definition of "multiple dwelling unit(s)" which is directly contrary to the definition arrived at based on the same "clear language" once contained in the cable system definition.

Certainly there is nothing in the statutory language nor the legislative history of the 1996 Act to justify an expansion of the definition of "multiple dwelling unit" to include the exact properties that have always been excluded from this definition. Where Congress has not explicitly defined a statutory term, the agency definition should be used. Sutherland ¶47.07, 47.27, et seq. Here, given a definition which has been maintained for so long and reiterated so many times, it cannot be gainsaid that Congress has adopted it for its own.

Indeed, far from indicating an intent to ascribe a new meaning to the term "multiple dwelling unit(s)," Congress's amendment of the definition of a cable system so as to delete the term -- in order

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[8/] The Commission recognized that the change in the rule in 1977 wherein "multiple unit dwelling" was substituted for the term "apartment dwelling" was a clarification which did not alter the character of the exemption. 2 FCC Rcd at 7322, citing the First Report and Order in Docket No. 20561, 63 FCC 2d 956, 966-77 (1977).

to expand coverage of the so-called "private cable exemption" from commonly-owned and managed "multiple dwelling unit(s)" to all facilities located wholly on private property-- only serves to underscore that Congress knew precisely what the term "multiple dwelling unit(s)" meant, especially in light of the United States Supreme Court decision on the matter. See FCC v. Beach Communications, Inc., 508 U.S. 307 (1993). Rather than delete the term "multiple dwelling unit," Congress could have achieved the same result by simply defining the term in a more expansive manner. By not redefining, Congress clearly chose to leave the well-understood meaning of the term "multiple dwelling unit(s)" intact. Thus, Congress must have relied upon the same long-standing definition in creating the "multiple dwelling unit(s)" bulk discount exception to the uniform rate structure requirement.

Both in eliminating the reference in the cable system definition and in amending the uniform rate structure requirement to include the reference, Congress relied upon an accepted definition of "multiple dwelling unit(s)" that has been used consistently for over twenty years. Altering this widely understood definition would defy congressional intent by changing the ground rules absent any congressional directive to do so. Accordingly, the Commission should utilize a definition of "multiple dwelling unit(s)" consistent with its earlier pronouncements and exclude all properties of a single family nature.

C. The Commission Should Not Apply Federal Antitrust Law To Determine Whether A Bulk Discount Is Predatory But Rather Should Apply A Bright-line Test Based On Price Differentials

Had Congress intended federal antitrust law to govern the market behavior of franchised cable operators competing to service MDUs via the offering of a bulk discount, Congress would simply have carved out the bulk discount exemption without more. Congress specifically provided

that "nothing in this Act or the Amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Sec. 601(b), 1996 Act. See also 142 Cong. Rec. S720 (daily ed. Feb. 1, 1996) (Statement of Sen. Craig) (emphasizing that this Act not intended to supersede Sherman Act or other antitrust law). Since the antitrust laws, including the law against predation, continued to govern telecommunications companies, it would have been superfluous for Congress to include the language it did, i.e., that a cable operator "may not charge predatory prices to a multiple dwelling unit," if Congress's intent was merely to parrot antitrust prohibitions. See Sutherland § 46.06 ("elementary" rule of construction to give effect to every word, clause and sentence of a statute). Equally important, there is no indication in the legislative history that Congress meant to shift responsibility for enforcement of federal antitrust law from the courts to the Commission.

Indeed, Congress's overall retention of the uniform rate structure requirement of the 1992 Cable Act underscores its continuing refusal to abandon emerging competitors to the prohibitive expense and extreme time delays associated with antitrust litigation. See, e.g., William Inglis, Etc., v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir 1981) cert. denied, 459 U.S. 825 (1982) (ten years after complaint filed appellate court upheld trial court's granting of judgment n.o.v. and ordered a new trial; later proceedings in case still occurring in April 1996); Lomar Wholesale Grocery v. Dieter's Gourmet Foods, 824 F.2d. 582 (8th Circ. 1987) cert. denied, 484 U.S. 1010 (1988) (circuit court upholds grant of summary judgment by trial court nine years after initiation of action). Obviously, the original impetus for a uniform rate structure stemmed from competitor's complaints that franchised cable operators were abusing the market power gained from de facto exclusive franchising to block competitive entry. The uniform rate requirement was intended to stop

the widespread practice of dropping rates only in that portion of the franchise area where a competitor had commenced service, leaving subscribers in the remainder of the franchise with the burden of cross-subsidizing that activity. Cable Television Consumer Protection and Competition Act of 1992, S.Rep. No. 102-92 at 76 (June 28, 1991). The practice was viewed as "predatory" even though the cable operator might not have run completely afoul of antitrust law. Even were such law actually violated, Congress recognized that the vast majority of emerging competitors could not afford to "wait out" proof of same in the courts. There is no reason to believe that Congress meant to reimpose this full-blown antitrust regime only where bulk discounts are concerned. Rather, Congress intended to loosen the reins on cable operators in this one limited circumstance and entrusted this Commission with developing the rules to police that competition such that bulk discounts had a basis in fact and were not arrived at solely to rebuff competitive entry.[9/]

Application of federal antitrust law to determine the legitimacy of bulk discounts will simply hand cable operators an additional weapon while simultaneously removing a true antitrust remedy from all competitors. It would be unconscionable to put the burden of proof associated with an antitrust predation case on competitors under circumstances where if that burden were met the competitor, given the absence of provisions to this effect, apparently neither receives treble damages

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9/ Indeed, a good case can be made that Congress simply meant to codify and thus endorse the Commission's own decision in the wake of the 1992 Act to create an exception for MDU bulk discounts as long as MDUs of similar size and with a similar contract duration were treated the same and as long as cost savings of volume offerings were actually passed on to the subscribers affected. 47 CFR 76.984(b). The Commission even described these bulk discount categories as "uniform, nonpredatory bulk discounts." See Report and Order and Further Notice of Proposed Rulemaking in the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-266, 72 RR2d 733, 842 (P&F)(1993)(emphasis added); Third Order on Reconsideration of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket Nos. 92-266, 92-262, 74 RR2d 1274, 1285 (P&F)(1994).

nor reimbursement of attorneys' fees. Congress could not have meant to grant a "right without a remedy."

Moreover, that burden of proof is far from certain and uniform if this Commission uses the federal courts as a guide. While most of the federal circuits agree that the price charged must be below a certain measure before predatory pricing can be deemed to exist, the circuits actually disagree as to what that measure is. Even where the circuits agree as to what the measure is, such circuits often disagree as to how to define that measure. For example, some circuits believe that the price ordinarily must be below the competitor's average variable cost, but disagree as to what constitutes variable cost. See, e.g., International Travel Arrangers v. NWA, Inc., 881 F.2d 1389 (8th Cir. 1993), cert. denied, __ U.S. ___, 114 S.Ct. 345 (1993) (pricing below average variable cost is normal test for predatory pricing), Adjusters Replace-A-Car v. Agency Rent-A-Car, Inc., 735 F.2d 884 (5th Cir., 1984), cert. denied, 469 U.S. 1160 (1985) (same). But compare McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1503 (11th Cir. 1988), cert. denied, 490 U.S. 1084 (1989) (cost held to include a necessary element of profit) with Continental Airlines, Inc. v. American Airlines, Inc., 824 F.Supp. 689, 701 (S.D.Tex. 1993) (opportunity costs in form of foregone revenues are not considered in determining average variable cost). See also Michael L. Denger, John A. Herfort, Predatory Pricing After Brooke [sic] Group: Predatory Pricing Claims After Brooke Group, 62 Antitrust L.J. 541, n. 74 (1994) (no clear standard to determine what costs are variable). The United States Supreme Court has thus far declined to resolve such disagreements. See Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) reh'g denied, __ U.S. ___, 114 S.Ct. 13 (1993). Surely, Congress did not intend for this Commission to do so here.

For all these reasons, if the Commission elects not to continue with its existing scheme of ascertaining permissible "nonpredatory" MDU bulk discounts, see note 9 supra, ICTA urges this Commission to develop a bright-line test based on price percentage differentials in implementing Section 301(b)(2). Only a bright-line test will properly advance congressional intent by insuring competitors timely, cost-effective relief while providing cable operators flexibility within precisely defined parameters. Focusing on price percentage differentials best approximates the actual workings of the competitive MDU marketplace and increases the ability of competitors actually to discover and challenge "predatory" bulk discounts.

ICTA proposes that a competitor, in order to make a "prima facie showing that there are reasonable grounds to believe that the discounted price is predatory," only need establish that the discounted price as between "like MDUs" in a franchise area varies by ten percent or greater. This ten percent differential should include those circumstances in which the cable operator charges the same "bulk discount" to "like MDUs," but affords only one property owner or manager either the right to a prepaid royalty or to ongoing revenue sharing such that the "bulk discount" is in actuality reduced by ten percent or greater to that property owner or manager.

The burden would then shift to the cable operator to prove an economic justification for the price differential along lines already earmarked by the Commission as acceptable. Examples of acceptable economic justifications include: proof of added costs due to (1) a line extension necessary to reach one of the MDUs; (2) special installation costs attendant upon the wiring of an historical building; (3) a pre- or post-wire of one of the MDUs: and (4) the provision of additional services either in the nature of a greater number of programming channels or of nonprogramming services

such as closed circuit security channels. The difference in price should equate to the difference in cost of service.

"Like MDUs" should also be defined more strictly than is the case under current Commission regulations. Presently, the Commission allows MDU "categories" to be drawn based on the size of the MDU and the duration of the bulk contract. 47 CFR 76.984(b). However, the cable operator is permitted complete freedom to determine the range of those size and contract duration categories, and can design such categories precisely to avoid application of the uniform rate structure requirement. Instead, the Commission should define MDUs as "like" if either (1) the difference in the number of units between MDUs is 50 or less, or (2) the smaller MDU has at least 75 percent of the number of units as the larger MDU. With respect to the contract duration criterion, the Commission should either delete this criterion outright or establish definitive categories for like treatment, e.g., 0 -5 years, 5 - 10 years, 10 - 15 years or over 15 years. In such fashion, the chances of predatory conduct are greatly reduced.

If the Commission retains its present bulk discount regulatory regime, or adopts a bright-line test to define predatory pricing, ICTA agrees that the procedures governing the adjudication of program access complaints will be sufficiently protective of complainants' rights here. Otherwise such procedures will be woefully inadequate especially if the Commission ultimately decides to apply principles of federal antitrust law. Without full discovery, the assistance of expert witness testimony and trial-type procedures, a complainant could not possibly hope to meet the burden of proof levied by federal antitrust principles. Again, the Commission would render the right afforded by Congress meaningless by removing all tools necessary for enforcement. The benefit of stream-

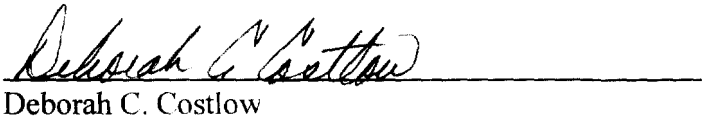
lined procedures is yet another reason why the Commission should opt for a bright-line test rather than the murky boundaries of federal antitrust law.

CONCLUSION

In light of the foregoing, ICTA requests that the Commission adopt rules and regulations consistent with ICTA's comments herein. The Commission should establish parameters for the new LEC test of effective competition which will genuinely serve to restrain cable rates. Second, the Commission should construe the exception to the uniform rate structure requirement narrowly in accordance with congressional intent and should establish a standard for predatory pricing which does not simply attempt to duplicate federal antitrust law given the prohibitive expense and extreme time delays associated therewith.

Respectfully submitted,

INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

By: 

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